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**In the Supreme Court of the United States**

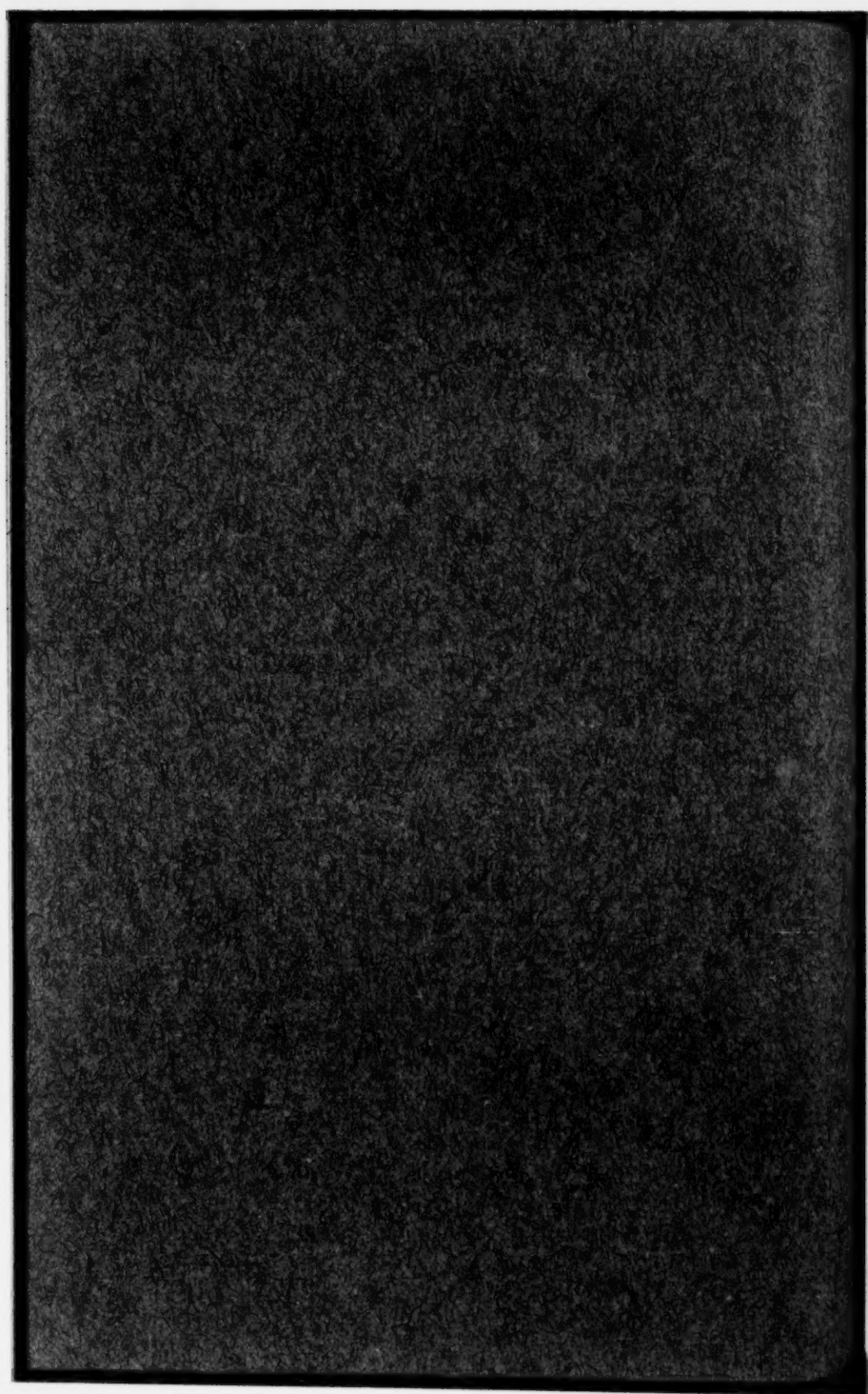
OCTOBER TERM, 1944

AMNIEL P. DECKER AND MARIE P. DECKER, IN-  
DIVIDUALS, TRADING AND DOING BUSINESS AS  
DECKER PRODUCE COMPANY, PETITIONERS

FEDERAL TRADE COMMISSION

AN PETITION FOR A WRIT OF HABEAS CORPUS TO REMOVE  
FROM COURT IN VIOLATION OF FEDERAL STATUTES AND  
CONSTITUTION

BRIEF FOR THE FEDERAL TRADE COMMISSION



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# ***In the Supreme Court of the United States***

OCTOBER TERM, 1944

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No. 635

AMMIEL F. DECKER AND MABEL P. DECKER, IN-  
DIVIDUALS, TRADING AND DOING BUSINESS AS  
DECKER PRODUCTS COMPANY, PETITIONERS

v.

FEDERAL TRADE COMMISSION

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE DISTRICT OF  
COLUMBIA*

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## **BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION**

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### **OPINION BELOW**

The court below entered an order dismissing the petition for review (R. 27) but did not render an opinion.

### **JURISDICTION**

The order of the United States Court of Appeals for the District of Columbia sought to be reviewed was entered on June 26, 1944 (R. 27). The order denying a motion for reconsideration

(R. 28-32) was entered July 26, 1944 (R. 38). The petition for a writ of certiorari was filed October 26, 1944. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code, as amended by the Acts of February 13, 1925 and June 7, 1934.

#### QUESTION PRESENTED

Whether Section 5 (c) of the Federal Trade Commission Act, as amended, authorized the court below to review an order of the Federal Trade Commission denying, without prejudice to its renewal, a motion, based upon facts alleged in an unverified answer, to dismiss a complaint issued by the Commission under Section 5 (b) of the Act.

#### STATUTE INVOLVED

The statutory provisions involved are Sections 5 (b) and 5 (c) of the Federal Trade Commission Act, as amended, which are printed in the Appendix, *infra*, pp. 7-10.

#### STATEMENT

Pursuant to the provisions of Section 5 (b) of the Federal Trade Commission Act, respondent issued a complaint charging petitioners with misrepresentations in connection with the sale and distribution of an exhaust muffler attachment (R. 9-13). Petitioners filed an unverified

answer (R. 33-38). The answer denied the proceeding to be "in the public interest" (as required by the Act), claimed "the complaint fails to allege facts sufficient in interstate commerce to give the Commission jurisdiction", and denied substantially all the allegations of the complaint. As an additional defense, the answer alleged that the attachment is a patented device, the patent being owned by petitioners, that all the alleged misrepresentations are based upon and grow out of the objects of the patent, and that these facts constituted a complete legal defense to the charges and deprived respondent of jurisdiction (R. 33-38). Petitioners moved, on the same day, to dismiss the complaint for lack of jurisdiction over the subject matter (R. 5, 13-14, 33). The motion did not claim, as did the answer, that the allegations of the complaint fail to show jurisdiction. The single contention was that the facts alleged in the answer showed lack of jurisdiction to entertain the complaint (R. 13-14). Respondent denied the motion without prejudice to petitioners' right to renew the motion upon the final hearing of the case (R. 15). Before any further proceedings were had before respondent (R. 5-6), petitioners asserting jurisdiction under Section 5 (c) of the Act, filed in the United States Court of Appeals for the District of Columbia a petition praying that respondent's order denying the mo-



tion to dismiss be set aside, the motion sustained, and the proceedings dismissed or modified in whole or in part (R. 1-4). Respondent moved to dismiss the petition on the ground, *inter alia*, that the court was without jurisdiction to entertain the petition (R. 4-8). The court entered an order dismissing the petition for review (R. 27) and also denied petitioners' motion for reconsideration (R. 28).

#### ARGUMENT

The jurisdiction of the court below to review an order of respondent is limited by Section 5 (c)<sup>1</sup> of the Act to "an order \* \* \* to cease and desist from using any method of competition or act or practice." The orders thus made subject to review are the final orders issued pursuant to Section 5 (b), which authorizes the issuance of complaints charging the use of unfair methods of competition or unfair or deceptive acts or practices, provides for a hearing on the charges, requires a report in writing setting forth respondents' findings as to the facts, and authorizes the issuance of orders "to cease and desist from using such method of competition or such act or practice." An interlocutory order denying, without

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<sup>1</sup> Section 5 (c) authorizes review "in a circuit court of appeals." "Circuit court of appeals" as here used includes the United States Court of Appeals for the District of Columbia. *Federal Trade Commission v. Klesner*, 274 U. S. 145.

prejudice to its later renewal, a motion to dismiss a complaint which may or may not culminate in a cease and desist order, is not within the scope of Section 5 (c). *Federal Power Commission v. Metropolitan Edison Co.*, 304 U. S. 375; *United States v. Illinois Central Railroad Co.*, 244 U. S. 82; cf. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U. S. 54. This construction of Section 5 (c) is in harmony with all the reported decisions and expressions of the various circuit courts of appeals. *Chamber of Commerce v. Federal Trade Commission*, 280 Fed. 45 (C. C. A. 8); *Federal Trade Commission v. Nulomoline Company*, Statutes & Decisions, Federal Trade Commission, 1914-1929, 35 (C. C. A. 2); see *Fashion Originators Guild v. Federal Trade Commission*, 114 F. (2d) 80, 83 (C. C. A. 2), affirmed 312 U. S. 457; *Miles Laboratories v. Federal Trade Commission*, 140 F. (2d) 683, 684-685 (App. D. C.), *certiorari denied*, 322 U. S. 752. The decisions of this Court and of the circuit courts of appeals cited by petitioners (Br. 12-13) are not in conflict. None of the decisions held an interlocutory order of an administrative agency subject to review, under a comparable statutory provision.

## CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FAHY,  
*Solicitor General.*

WENDELL BERGE,  
*Assistant Attorney General.*

HERBERT BORKLAND,  
*Special Assistant to the Attorney General.*  
NOVEMBER 1944.

